

December 11, 1997

Advisory Opinion 1997 - No. 9
Ballot measure hearings

The Board has received a request for an advisory opinion from Representative Edward Murray. Rep. Murray waived confidentiality.

QUESTION

The request asks for the Board's opinion on legislative hearings as follows:

Specifically I request that the Board address whether it would be outside the "normal and regular conduct of the office" of a legislator, and therefore a violation of the State Ethics Act, if a legislative committee held a public hearing on a ballot proposition under the following scenario:

The format of the hearing will consist of a debate between invited panelists who support and oppose the ballot proposition. Committee members, some of whom have taken public positions in support of or in opposition to the proposition, will be allowed to question the panelists. There will be no other public testimony, nor any objective, neutral presentations on the proposition or its policy implications for the legislature. The hearing will be held less than two months from election day and will be aired on statewide television. The committee had similar legislation pending before it during the last legislative session but declined to hold hearings on the subject.

The request further asks whether the Board's conclusions would change assuming different facts about the format, timing, or history of committee action.

OPINION

A hearing conducted in the manner specified in the request would be violation of the State Ethics Act. Legislative committees can meet in a workshop fashion to study and review ballot measures, subject to the conditions set forth in this opinion.

ANALYSIS

The general prohibition on use of public facilities for campaign purposes is found in RCW 42.52.180. The only exceptions are:

(a) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition as long as (i) required notice of the meeting includes the title and number of the ballot proposition, and (ii) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(b) A statement by an elected official in support of or in opposition to any

ballot proposition at an open press conference or in response to a specific inquiry. For the purposes of this subsection, it is not a violation of this section for an elected official to respond to an inquiry regarding a ballot proposition, to make incidental remarks concerning a ballot proposition in an official communication, or otherwise comment on a ballot proposition without an actual, measurable expenditure of public funds. The ethics boards shall adopt by rule a definition of measurable expenditure;

(c) Activities that are part of the normal and regular conduct of the office or agency; and

(d) De minimis use of public facilities by state-wide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities.

- USE OF FACILITIES

At the outset the Board must consider whether a legislative hearing of the type described in the question would be a "use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for . . . the promotion of or opposition to a ballot proposition." The hearing room and the staff time and resources devoted to the subject are clearly legislative facilities within the meaning of the statute. While the stated intention of the hearing may not be the assistance of a ballot measure campaign, by providing an opportunity for a publicized and televised event, the committee is at least indirectly assisting the campaigns. Therefore, such a hearing would be prohibited by the general provision of RCW 42.52.180(1), unless it is covered by one of the exceptions.

- COLLECTIVE DECISION

Subsection (2)(a) provides an exception for actions of elected bodies to make decisions regarding ballot propositions. The history of this provision shows that it was intended to cover those situations where governing bodies, most often city or county councils, take a position on a ballot proposition which affects their area in some way. The provision was passed in direct response to the King County Council situation described in *King County v. Public Disclosure Commission*, 93 Wn.2d 559 (1980). For the Legislature, it would only apply if the House or Senate were considering such a resolution. Such activity could not take place during the interim, since there is no way for the full body to take action outside the legislative session.

- PRESS CONFERENCE OR INQUIRY

Subsection (2)(b) allows statements at "an open press conference or in response to a specific inquiry." A hearing is by definition a meeting of the committee, and cannot be considered a press conference. In any event, a press conference structured around a ballot measure normally would not fit the exception. In **Advisory Opinion 1997 - No. 5**, responding to a question about staff support for a press conference to start an initiative campaign, the Board stated that "while elected officials are expected as part of their official duties to comment on matters that affect the state, they are not expected to use publicly sponsored and supported press conferences to initiate and promote ballot measures."

The inquiry exception is obviously inapplicable.

- DE MINIMIS USE

Subsection (2)(d) permits "de minimis" uses "incidental to the preparation or delivery of permissible communications." This exemption may permit incidental statements favoring or opposing a ballot measure during a hearing which has been convened for a lawful purpose. However, it cannot be the sole authority for the hearing because the use would then be more than "de minimis" and it would not be "incidental."

- NORMAL AND REGULAR CONDUCT

Subsection (2)(c) exempts "normal and regular conduct." In **Advisory Opinion 1995 - No. 18** the Board adopted earlier interpretations which define "normal and regular" to mean "lawful and customary." It is certainly "normal and regular conduct" for legislative committees to hold hearings on public policy issues within their jurisdiction. With respect to staff support, as stated in **Advisory Opinion 1995 - No. 18**:

Proper staff activity also includes analysis and explanation of ballot measures. It is "normal and regular" for legislative staff to analyze and explain the content of an initiative measure, as well as the arguments for and against the measure. It is also normal and regular to explain and analyze the legal and policy options which the legislature might consider if the ballot measure is approved by the voters. However, presentation or distribution of such information in any manner that suggests it is intended to solicit support or opposition to a measure is improper and would be a violation.

Using this framework for analysis, it is clear that legislative hearings on ballot measures could fit within the "normal and regular conduct" exception, but only if they meet certain conditions to ensure that legislators can obtain needed objective policy information, without providing an opportunity for the mis-use, or appearance of mis-use, of the legislative hearing process.

- CONDITIONS FOR "NORMAL AND REGULAR CONDUCT"

The opinion request asks the Board to assume different facts about the timing and format of the hearing in order to give guidance about the limits to such activities. The Board sets forth the following guidelines, but they are not meant to be an exhaustive list of the possibilities.

Ballot measure committee hearings may be permissible if they have a clearly stated legislative purpose, present a public policy issue within the committee's jurisdiction, and are limited to objective information-gathering about the measure and its legal and policy implications. Hearings which are structured or conducted for or against a ballot measure would not be normal and regular, since they would be neither lawful nor customary.

In order to meet the requirement for objective information-gathering rather than being an opportunity for advocacy, the committee meeting should be structured as a "workshop" rather than a typical public hearing. Oral presentations by legislative staff would be permitted to the same extent that staff is currently authorized to provide written analysis. Other testimony would be restricted to presentations by experts not affiliated with the campaigns for or against the ballot measure.

If a single expert is utilized, that person would be limited to making an objective and neutral presentation. If multiple experts are used, they should be selected as much as possible to ensure an equal balance. The Board recognizes that the committee chair will not know in advance the full extent of the experts' remarks. All that is needed is a demonstrable effort to achieve and maintain objectivity and balance in the selection and during the testimony.

The final factor for consideration is proximity to the election. This factor has been applied in previous opinions dealing with press releases and Internet site content. Recently, in **Advisory Opinion 1997 - No. 7** relating to the use of legislative materials for doorbelling, the Board stated that it is not "normal and regular to initiate state-funded communication in close proximity to an election." The Legislature must be able to respond to changing and urgent circumstances, but the Board will apply increasingly rigorous scrutiny to the stated legislative purpose for ballot measure hearings as the election date approaches.

Applying these conditions to the hypothetical situation described in this request, the proposed hearing would not be permissible. Although the "invited panelists" are intended to provide balanced viewpoints, it appears from the description that they would be identified with the campaigns for and against the ballot proposition and would not be expected to provide objective testimony. Further, the proximity to the election calls for a clearly demonstrated legislative purpose for the hearing.

Since the format of the "hearing" in the request is essentially a hosted debate, it is arguable that the legislature is simply providing a "neutral forum" for public debate on the measure. This use of public facilities has often been permitted as long as it is offered on an equal basis to both sides. If rent is charged, it must be paid by all users, for example. "Candidate nights" are frequently located in public facilities under this concept. Since this activity is not customary for the Legislature, the Board does not believe that it would meet the normal and regular exception for legislative committee hearings, even though "neutral forums" may be appropriate in different circumstances.

CONCLUSION

By setting forth these conditions for meeting the "normal and regular conduct" exception to the use of facilities prohibition, the Board is stating the minimum standards to be observed. The Senate and House of Representatives may choose to adopt more restrictive policies.

Consistent with previous opinions in instances where the provisions of the State Ethics Act are unclear absent the Board's opinion, the advice given in this opinion will be applied prospectively only.